Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

WILLIAM P. HICKEY

PETITIONER

v

ROBERT B. HOLLISTER
&
OXLEY, MALONE,, FITZGERALD & HOLLISTER

RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE U.S. SIXTH CIRCUIT COURT OF APPEALS

WILLIAM P. HICKEY
1970 CR 32
Helena, OH 43435
(419) 457-5525
Petitioner

71 pp

QUESTIONS PRESENTED

1.) Is the only liability for attorneys under 42 U.S.C. 1983 in a civil action, the case where an attorney uses an unconstitutional attachment or replevin statute, as the Sixth Circuit Court of Appeals seems to indicate?

2.) What is the meaning of Wyatt v. Cole 112 S. CT. 1827?

3.) Are the 7th and 11th Circuits correct that Wyatt v Cole stands for more than the 6th Circuit indicates?

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OPINION BELOW

The opinion of the Court of Appeals is unreported. A copy of that opinion appears in the Appendix.

JURISDICTION

This is an action involving 42 USC 1983.

The opinion of the Court of Appeals was given on March 2, 1994, and was mandated on March 24, 1994.

The jurisdiction of this Court is invoked under 28 USC 1254.

CONSTITUTIONAL PROVISIONS

The Fourteenth Amendment to the Constitution of the United States provides in Section 1 as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall

abridge the privileges or immunities of citizens of the united States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the Laws.",

42 USC 1983

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT

1. Background

The Hancock-Wood Electric Cooperative closed out a service contract to farm land on which no one lived in 1982, but at which a night light was left on. For some reason only known to the

electric company, they did not remove the meter, and no bills or service were provided thereafter until 1990, at which time a new service contract was signed. The Electric Co. then made up monthly bills going back to 1982, and put them on the contract signed in 1990. Lightening had struck the service installation and petitioner Hickey contested the amount of power alleged lost, as well as the question of whose fault it was. Petitioner maintains that their "book account" was fraudulent.

2. Municipal Court Proceedings

The Electric Co. apparently gave the fraudulent book account to the respondents for collection and they sued the petitioner in a county in which neither the petitioner lived, or the cause of action arose. As a matter of fact, the enabling statute for the

Bowling Green Municipal Court gave it jurisdiction in the city of Bowling Green and surrounding townships all located in Wood County. Petitioner's property is in Sandusky Co. Petitioner filed a motion with limited appearance to appraise the court that it did not have jurisdiction. The court dismissed the suit, but on instigation of the defendants, the court reopened the case saying the matter was one of only venue.

Respondents then took their void default judgment, and called for a debtors examination in the same municipal court that did not have jurisdiction. When peititioner did not appear, respondents filed a motion for a bench warrant, as a result of which petitioner was jailed for not appearing in the distant forum which lacked jurisdiction.

3. Common Pleas Proceedings.

According to well established law, petitioner sued the Electric Co. in Sandusky County where the electric power was lost. Petitioner alleged a violation of the Ohio Consumers Protection Act, distand forum abuse, false imprisonment, abuse of process and malicious prosecution.

For reasons, believed political, the case was transferred to the Wood County Common Pleas Court. There the case went through the hands of each common pleas judge, each of which after several months delay, declared a conflict of interest. With the statutory period running out, petitioner filed an action in mandamus, and a judge from another county was assigned by the Ohio Supreme Court.

The visiting judge quickly sustained the B.G. Municipal Court.

Petitioner appealed.

4. State Appellate Proceedings.

The Ohio Sixth District Court of Appeals held that the municipal court default judgment was absolutely void, and remanded the case to common pleas for a determination of the other issues, not inconsistent with their holding.

5. District Court Proceedings.

Petitioner filed an action against the attorneys for violating his constitution rights under 42 USC 1983.

The District Court held that under Lugar an attorney had immunity from suit except in the case of replevin, or attachment where the replevin or attachment statute was unconstitutional.

6. Court of Appeals Proceedings.

Briefly, after citing nine cases as authority, the Sixth Circuit Court of Appeals sustained the District Court.

The court held that: "To satisfy the first condition [In Lugar] for finding that a private parties actions are 'fairly attributable to the state', a plaintiff cannot merely challenge a private parties misuse of a statute, but rather must challenge the constitutionality of the state statute ...".

This holding does not square with Burrell v Bd. of Trustees of Ga. Military College 970 F. 2d 785 [11th Cir. 1992]; nor that of Sherman V. Four County Counseling Center 987 F. 2d 397 [7th Cir. 1993].

REASONS FOR GRANTING THE WRIT

I. Wyatt v Cole 112 S. Ct. 1824; 112 S. Ct. R. 47; 118 L. Ed. 2d 504.

The Syllabus in Wyatt v. Cole

characterizes the case as involving the misuse of governmental processes by private defendants; and specifically the deprivation of property by an attorney using a state statute which violates a citizens due process of law as guaranteed by the 14th Amendment of the U.S. Constitution.

The case holds that the attorney is not entitled to a qualified immunity; but only a good faith defense as it existed at the common law in 1871.

The case leaves for another day the question of whether or not a good faith defense is to be decided by a jury, as it did in 1871 - or so says the dissent.

The Sixth Circuit Court of Appeals holds that Wyatt v. Cole only denies qualified immunity if he uses an unconstitutional statute in a single type of action - namely replevin, or attachment.

The Plaintiff in this action urges that Wyatt v. Cole is not so limited.

Strangely, the Sixth Circuit itself held in Duncan v. Peck 844 F. 2d 1261 that private defendants do not have qualified immunity under § 1983, but now holds that this does not apply to attorneys.

Clarification Is Required.

II. Judicial History Of 35 USC 1983.

A review of Wests Decennial Digests since 1966 shows that there have been over an estimated 850 cases that have dealt with immunity under the 1983 statute.

Obviously, the granting of immunity has not decreased litigation, because the same questions appear over and over. Obviously, the people bringing these actions have not felt that the equity of

the matter in their fact situations were dealt with by a court ordered immunity from liability.

Since Wyatt v. Cole, there has been a case in the 11th Circuit (Burrell v Bd. of Trustees of Ga. Military College 970 F. 2d 785 (1992), and Sherman v. Four County Counseling Center 987 F. 2d 397 (1993) in the 7th Circuit which have dealt with immunity for private individuals.

In the Burrell case, the court reviewed the cases for and against immunity in other than replevin cases. It found that where a private person was told by a court to do something, or where a government contract dictated a course of action, immunity was granted. It also found that immunity had not been granted prior to Wyatt in cases where:

a.) a private landlord enlisted a police officer to unlawfully evict.

b.) a private person had elicited the help of a district attorney to indict another for perjury.

c.) a private person acting as guardian had elicited government officials to sterilize the plaintiff; and

d.) in the Sixth Circuit, where a private person had wrongfully attached property and was charged with malicious prosecution. Duncan v Peck 844 F.2d 1261.

The Court in the Burrell case said that while the Supreme Court in Wyat did not explicitly overrule qualified immunity in other than attachment cases, the Court's analysis does not bode well for the continued vitality of qualified immunity.

In Burrell, the Court held that in cases other than government contract questions and court order cases where private individuals act in concert with

public officials to deprive another of their constitutional rights, private defendants can not claim qualified immunity. The court further states that the defendants must bear the risk of trial.

In the Sherman Case, the court states:

"The Burrell court stressed that qualified immunity is extended to give public officials the peace of mind to exercise discretion in decision making. The public interest is not served by allowing the qualified immunity defense to 'encourage private individuals to redress their differences with another person by conspiring with public officials to deprive that person of his or her constitutional rights.' We find this reasoning persuasive, ...".

It then said that they believe that the case at bar fell into the category

where the private party was acting under court order.

Certainly the above mentioned cases show that the holding in Wyatt is not limited to unconstitutional attachment statutes - and for good reason.

In the case at bar the Sixth Circuit in an Unpublished decision, has held that the defendant attorneys had not acted under color of law, "Because Hickey does not challenge the validity of the state statutes or procedures allegedly misused by Hollister", and even though the attorneys performed the following acts:

1. sued on a fraudulent book account.
2. sued a defendant in a county where neither the cause of action arose, or the defendant resided.
3. sued in a court whose jurisdiction was totally void.
4. held a debtor's examination on a void judgment.

5. filed a motion for a bench warrant in the court which did not have jurisdiction, and on a totally void default judgment.
6. caused bond to be set at the full amount of his complaint to bring cash into the distant county (even though defendant was a property owner).

In view of these facts what would the public's perception be as to why the court did not want its decision published?

III. The Prey and the Preditor - There Must Be a Balance.

There was no intent by Congress to exempt attorneys from liability when the Civil Rights Act was passed in 1871; because it is readily apparent that attorneys are the instigators of court

actions which deprive citizens of liberty and property. Furthermore, they were liabel at the common law as it existed prior at 1871 for abuse of process and malicious prosecution as the courts recognize in their opinions. It was judicial fiat that transformed this liability into an immunity under the mistaken belief that it would decrease and shorten litigation. History has shown this proposition, which was only an assumption when it was made, to be in error.

Attorneys are officers of the court who are charged with initiating actions and bringing the facts before the court. This process has degenerated into one where an attorney using every liberty available brings one outlandish argument before the court and the opposing attorney does likewise on the other side. It is reported that one District

Judge in Ohio has stated: "Who says I dispense justice? I hear one attorney proposing one extreme argument on one side of a question, and another proposing an extreme argument on the other side of the issue, and I choose between them. Who says that's justice?"

Only in criminal actions do state attorneys run with the ball. In civil cases, no action can be taken except at the instigation of a private attorney. This being so, how can it be stated that private attorneys in civil cases do not act "under color of law"? Certainly prosecuting attorneys have been held to act under color of law.

There is a great reluctance for attorneys to sue other attorneys. In the case at bar, plaintiff was turned down by 3 sets of attorneys having experience in 42 USC 1983 actions; and therefore plaintiff has plead the case pro se. One

attorney said he wouldn't touch the case with a ten foot pole.

Yet there is no reluctance for attorneys to sue doctors for malpractice, or companies for product liability - to the point where there is a health care crisis; and aircraft companies have stopped making certified training airplanes in the U. S. because liability insurance has risen to 75 thousand dollars ($75,000) per civilian training airplane. There are no certified training airplanes made in America today.

The foreigners are laughing at us!

There can be no doubt that the over zealousness of attorneys has produced bad law!

Until very recently at least, courses in ethics have not been taught in our law schools.

Attorneys are always looking for the case with big monetary reward. One

doctor-lawyer who works in the emergency ward in an Akron Hospital said that he never hears doctors talk about money or how much they got from an operation, but when ever he goes to a gathering of attorneys all he hears about is the big cases they just had.

Today, there is the perception that the good attorney is one that knows the loop holes in the law, and knows how to get around the spirit of the law.

Clearly, the judicial fiat of qualified immunity for lawyers has not worked to reduce litigation or improve the quality of the law. Clearly, the judicial theory that an attorney must be given immunity from prosecution so that he will zealously pursue his clients interest has not been born out by the results.

IV. Defendants Would Be Liable Under The Common Law As It Existed In 1871 For Malicious Prosecution, Abuse of Process, and Lack of Probable Cause.

At the common law, public officials were subject to liability for abuse of process and malicious prosecution. There was no stigma against it, because they were servants of the King, and his servants had to be accountable to him. It was sufficient that the public servants should have a good faith defense and probable cause defense. It was this defense which the courts have made into an immunity by judicial fiat; and this immunity has not served us well! Courts have been want to create this immunity under the mistaken belief that the summary judgment which it allows, would reduce litigation. The facts do not bear this out.

Under the common law the test for malice was a subjective one. Courts have changed this into an objective test requiring that the action be for an unlawful purpose. To establish absence of probable cause, a plaintiff was required to prove that a reasonable person, knowing what the defendant did, would not have believed that the suit was well-grounded.

This later test is curious indeed. Courts have long held that ingnorance of the law is no excuse. The test should never involve what the average person knows the law to be. Rather, it is submitted the test should be _ did the defendant's action come within the purview of the literal words of the statute. A defendant who acted within the literal words of a statute should be held to have probable cause without knowledge of what the court cases say

about the statute. Any officer who enforces the law should be deemed to have read the statute. It is only when courts give meaning to statutes that fall outside of the literal words of the statute, that reasonable minds can not be deemed to know the law. It is submitted that the walls of our law libraries are being pushed out by court decisions that go beyond the literal meaning of statutes.

The state of affairs is that when a client comes to a lawyers office to find out what a statute means, he must be told that the lawyer does not know until he checks all of the cases that have come down under the statute.

Citizens send 540 Senators and Congressmen to Washington and give each a million dollars for a staff to write our laws. Is it too much to expect that they should at least get the words right.

When a court reviews those words and finds that they are too vague and indefinite, it ought to strick the statute down and have the legislature make the words treat the concerns pointed out by the court; and the public should be secure in the belief that if they act according to the words of the statute, they will be secure from liability for acting without probable cause.

In the case at bar, the statute says: "Every person who, under color of any statute ... of any state ... ". Literally this means every person who acts within the purview of any state statute to deprive another of his rights secured by the Constitution shall be liable under §1983.

Stated another way, anyone who seeks to deprive another of his constitutionally guaranteed rights by invoking state statutes to do so, is

subject to an action under §1983 at which he has the right of the common law defenses in a jury trial. The King would require no less!

V. Defendants Have Violated 8 Disciplinary Rules - Yet Courts Ignore Attorney Violations of Ethics.

All of the following disciplinary rules of ethics were violated by the attorney acts listed on pages 13 and 14, supra. These rules were established by the American Bar Association, and adopted by the Ohio Supreme Court.

DR 7-102 REPRESENTING A CLIENT WITHIN THE BOUNDS OF THE LAW.

(A) In the representation of a client, a lawyer shall not:

(1) File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injury another.

(2) Knowingly advance a claim or defense that is unwarranted under existing law, ...

(3) Conceal or knowingly fail to disclose that which he is required by law to reveal.

(4) Knowingly use ... false evidence.

(5) Knowingly make a false statement of law of fact.

(7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.

(B) A lawyer who receives information clearly establishing that:

(1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal.

DR 7-106 (B) In presenting a matter to a tribunal, a lawyer shall disclose:

(1) Legal authority in the controlling jurisdiction known to him to be directly adverse to the position of his client and which is not disclosed by opposing counsel.

[The attorneys never once cited cases against their clients position, but on the other hand cited approx. 10 unreported cases.]

When courts do not hold attorneys libel for violating such ethical standards, public perception is that attornies can get away with murder !!! (See the April, 1994 Reader's Digest, pg. 131.)

CONCLUSION

The Sixth Circuit Court of Appeals apparent holding that only the use of an unconstitutional statute causes a private party to act "under color of law" is far too restrictive, as shown by the cases in the First and Eleventh Circuits.

The facts in the case at bar, are exemplary of what needs to be addressed by the Supreme Court of the United States.

William D. Hickey

Certificate of Service

I certify that I am a member of the Bar of this Court and that three copies of the above petition for writ of certiorari to the Sixth Circuit Court of Appeals were served upon counsel for the respondents, by U.S. mail, first class postage prepaid, addressed to H. William Bamman, 414 North Erie St., P.O. Box 2328, Toledo, Ohio 43603; this 14th day of May, 1994.

William D. Hickey

IN THE COURT OF APPEALS OF WOOD COUNTY

William P. Hickey	Appeals 92WD082
Appellant	Trial 92CV104
Hancock Wood Electric Cooperative	OPINION AND JUDGMENT ENTRY
Appellee	Decided 6/30/93

* * * * *

William P. Hickey, pro se.

Robert B. Hollister, for appellee.

* * * * *

SHERCK, J. This is an accelerated appeal from an order of the Wood County Court of Common Pleas which dismissed a lawsuit on grounds that it was both barred by the doctrine of res judicata and failed to state a claim upon which relief could be granted. Because we find that a municipal court judgment which served as the underlying basis for the abuse of process lawsuit was void for lack of subject matter jurisdiction, we reverse.

Appellant, William P. Hickey,

resides in Sandusky County, Ohio. Appellee, the Hancock Wood Electric Cooperative, Inc., has its principal office in Wood County, Ohio.

On April 5, 1991, appellee brought suit against appellant in the Bowling Green Municipal Court for non-payment of electric services on an allegedly delinquent account in the amount of $2,526.35. Appellant failed to file an answer instead, appellant states that he sent the court a request that it dismiss appellee's complaint for want of jurisdiction. This request was apparently denied and a default judgment was entered in appellee's favor.1

The Bowling Green Municipal Court then scheduled, at appellee's request, a judgment debtor examination of appellant. When appellant failed to appear for this examination, the court issued a capias for his arrest. On January 5, 1992,

appellant was arrested in Sandusky County and transported to the Wood County line where he was transferred to the custody of a Wood County Sheriff's deputy. He was then jailed. On January 7 1992, appellant was released on bond.[2] He appeared in court the following day and submitted to the judgment debtor's examination.

On Januiary 28, 1992, appellant brought suit against appellee in the Sandusky County Court of Common Pleas. Appellant's complaint alleged that appellee had committed fraud, libel, malicious prosecution, false arrest and imprisonment, abuse of process, and, because appellee had pursued a lawsuit in a "distant forum," it had violated the Ohio Consumer Sales Practices Act.[3]

On February 10, 1992, appellee moved to dismiss appellant's complaint because (1) the Bowling Green Municipal Court

judgment barred relitigation of those issues, and (2) appellant had filed to state a claim upon which relief could be granted. Alternatively, appellee asserted that Sandusky County was an improper venue for this suit and requested a change of venue to Wood County. The Sandusky County court declined to rule on appellee's motion to dismiss, but found proper venue in Wood County and ordered the case transferred there.[4]

In Wood County, appellee renewed its motion to dismiss and filed a supporting memorandum to which it attached the unverified judgments of the Bowling Green Municipal Court relating to the suit there. On August 24, 1992, a pre-trial conference was held wherein the parties agreed that the sufficiency of the complaint stood or fell on the legal effect of the judgment issued by the

municipal court in the original suit and the later action in aid of execution on that judgment. The parties agreed to submit the issue to the trial court for adjudication.

On September 2, 1992, the trial court entered a judgment wherein it found that the municipal court's decision, "*** Was possibly 'voidable' ***" because of the questionable venue of the case. However, the trial court further determined that because appellant failed to move for a change of venue, or otherwise participate in the proceedings in the municipal court, or appeal its finasl judgment, he waived any defect. Accordingly, the trial court ruled that the municipal court judgment is a res judicata bar to relitigation of the electric service contract dispute. Additionally, the trial court found that appellant failed to state a claim upon which relief may be granted.

As a result of its rulings, the trial court dismissed appellant's complaint. From this dismissal order appellant appeals setting forth the following five assignments of error:

"1.) The lower court erred in dismissing the case.

"2.) The lower court erred in overruling plaintiff's motion to transfer the case back to Sandusky County.

"3.) The lower court erred in holding that the default judgment was anything but void.

"4.) The lower court erred in not accepting plaintiff's allegations of fact as true when they ruled upon the motions.

"5.) That on the undisputed record of a void judgment, plaintiff's citing of Santiago v. S.S. Kresge 2 O.O. 3d 54, and facts apparent from the Municipal Court record, the lower court erred in not holding that there were unconscionable acts violating RC 1345.03 and thereby avoiding the necesity of further delay and this appeal."

With respect to appellant's venue argument as set forth in his Assignment

of Error No. 2, we note that the subject of this suit is the alleged wrongful activity of appellee in the Bowling Green Municipal Court which is located in Wood County. Since there is an available forum in Wood County, appellee resides in Wood County, appellee has its pricipal place of business in Wood County, and appellee conducted its alleged tortious activity in Wood County, it is the correct venue for this matter. See CivR.3(B)(1),(2),(3,(10) and (C). Accordingly, appellant's second assignment of error is found not well-taken.

The parties, during oral argument, agreed that the remainder of appellant's assignments rest on whether the municipal court's judgment was void as expressed in appellant's third assignement of error. We, therefore, will discuss these remaining assignments together.5

The doctrine of res judicata states that a final judgment rendered on the merits by a court of competent jurisdiction is conclusive of rights, questions, and facts in issue as to the parties in an action and is a complete bar to subsequent action on the same cause of action between those parties. Whitehead v.General Telephone Co. (1969), 20 Ohio St.2d 108 at paragraph one of the syllabus. Here, although the parties are identical, the cause of action is not on account but stems from the fact that a suit was brought on account. Therefore, the applicable rule of law is the doctrine of collateral estoppel which, "*** precludes the relitigation, in a second action, of an issue that has been actually and necessarily litigated and deteremined in a prior action which was based on a different cause of action. ***" Id., at 112. (Emphasis in

original). See, also, Restatement of Law, Judgments, 75, Section 45, Comment (c).

As to whether collateral estoppel was available where the original judgment was obtained by default, Section 68(f) of the Restatement provides that a default judgment is conclusive as to the cause of action upon which the first action was based, "*** [b]ut in a subsequent suit based upon a different cause of action the judgment is not conclusive as to the truth of the allegations in the plaintiff's complaint,***" Id., at 302. Here, although appellant's complaint states that he had a defense in the first action the causes of action he asserts arise out of the method, manner, and tactic by which judgment in the first matter was obtained. Since appellant's complaint in the second action goes not to the truth of the allegations in the

first aciton but to the sufficiency of the judgment, collateral estoppel would, therefore, not bar the second action if, as appellant asserts, the judgment of the Bowling Green Municipal Court is void for lack of subject matter jurisdiction.

Municipal courts are statutory courts of limited jurisdiction, City of Bedford v. Lacey (1985), 30 Ohio App.3d 1, 3-4, and may exercise only such powers as are conferred upon them by statute. State ex rel Foremen v. Bellfountaine Municipal Court (1967), 12 Ohio St.2d 26, 29. "If courts transcend the limits which the law prescribes, and assume to act where they have no jurisdiction, their acts are utterly void." Hoerner v. Downs (1989), 63 Ohio App.3d 286, 288; see, also, McCormac, Ohio Civil Rules Practice (1992), 142-144. The issue of a court's lack of subject matter jurisdiction may be raised at any point

in the proceeding, on appeal, Fox v. Eaton Corp. (1976), 48 Ohio St.2d 236,238, overruled on other grounds 62 Ohio St.3d 24, or may be attacked collaterally. State v. Sturm(1982), 7 Ohio App. 3d 244,245.

1, 4-5.

> "As commonly used, 'jurisdiction' refers to the judicial power to hear and determine a criminal prosecution (or a civil dispute). This is called 'territorial jurisdiction' or 'subject matter jurisdiction.'" State v. Williams (1988), 53 Ohio App. 3d 1, 4-5.

R.C. 1901.18 defines the subject matter jurisdiction of a municipal court. In pertinent part, the statute provides that,

> "Subject to the monetary jurisdiction of municipal courts as set forth in [R.C. 1901.17], a municipal court has original jurisdiction within its territory in all of the following actions or proceedings ***"
>
> "(3) In any action at law based on contract ***." (Emphasis added.)

R.C. 1901.02(A) provides that municipal courts, "*** have

jurisdiction within *** their respective municipal corporations ***." R.C. 1901.02(B) provides that the Bowling Green Municipal Court additionally, "*** has jurisdiction ***" within several other enumerated municipal corporations and townships all of which are within Wood County, Ohio.

In order to satisfy the territorial jurisdiction of a municipal court, three types of statutory contact have been delineated,

> "*** (1) The subject matter of the action or proceeding is located within the territorial limits of the municipal court; (2) the defendant or some one of the defendants resides within the territorial limits of the municipal court; or (3) the defendant or some one of the defendants is validly served with a valid summons within the territorial limits of the municipal court." Malamed v. Catalano (M.C. 1981), 200.O.3d 428,434; see, also, Kacian v. Illes (1970), 24 Ohio App.2d 43, 52-56.

Appellee's original complaint in the Bowling Green Municipal Court failed to allege that any part of its dealings with appellant occurred within the territorial boundaries of that court. Appellee failed to allege that appellant resided within the territorial limits of the court. The record is silent as to the location of service of summons on appellant.

The absence of such allegations would normally not affect a civil complaint filed in a municipal court. However, when, as here, the territorial jurisdiction of the court has been challenged, the plaintiff has the burden of establishing a sufficient nexus to the forum court. Any subsequent action by the trial court without having that jurisdictional nexus established is void for want of subject matter jurisdiction.6 Accordingly, appelllant's first, third

and fourth assignments of error are well-taken.

Similarly, it would appear that, based upon Santiago v. S.S. Kresge (1976) 2 O.O.3d 54, appellant has at least pled a valid cause of action concerning improper forum choice. Accordingly, appellant's fifth assignment of error is well-taken.

On consideration whereof, the court finds substantial justice has not been done the party complaining, and the judgemnt of the Wood County Court of Common Pleas is reversed. This cause is remanded to said court for further proceedings not inconsistent with this opinion. It is ordered that appellee pay court costs of this appeal.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App. R.27. Seee also 6th Dist. Loc.App.R. 4, amended 1/1/80.

Peter M. Hanwork,J.
Charles D. Abood,J.
James R. Sherck,J.

1A complete record of the Bowling Green Municipal Court case has not been made a part of the record in this case; however, the parties do not contest what occurred there.

2See R.C. 2713.09, 2713.13.

3Appellant contends that the assertion of appellee's municipal court complaint that a valid contract existed is a misrepresentation and that, because the municipal court had no jurisdiction the complaint, is not privileged as concerns the claim of libel. Siimilarly, because any action in the municipal court was a nullity, which appellee knew or should have know, then collection efforts, including appellant's arrest, constitutes false imprisonment.

4The Wood County Court summarily denied appellant's later motion to return the case to Sandusky County.

5We note that prior to the final conferenbce on this matter, the procedural posture of this case was identical to that in State ex rel Greeman v. Morris (1991), 62 Ohio St.3d 107. There, it was held that, "*** res judicata may not be raised by motion to dismiss under Civ.R. 12(B). ***." Id., at 109. Neither may complaints and judgment entries submitted without affidavit be considered when a Civ.R. 12(B) motion is disposed of as a motion for summary judgment under Civ.R. 56. Id. In this matter, however, these defects were waived by the parties who agreed to submit the matter to the trial court for judgment on the legal issue.

6We specifically decline to impose a requirement similar to F.R.C.P. 8(a)(1) which requires a jurisdictdional statement in each complaint. Such a rule would be unduly burdensome in the context of a municipal court's high volume of cases.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

William P. Hickey,

Plaintiff Case 3:92CV7557

vs.

Robert B. Hollister,etal

Defendants MEMORANDUM AND ORDER

Potter, J.:

This action is before the Court on defendants' motion to dismiss, plaintiff's opposition and defendants' reply. Also before the Court is defendants' motion to strike plaintiff's opposition and plaintiff's opposition. This is a pro se 42 U.S.C. § 1983 case in which plaintiff alleges abuse of process and malicious prosecution. Defendants seek to dismiss, inter alia, pursuant to Fed. R. Civ. P. 12(b)(6).

Plaintiff filed, without leave and in violation of Fed. R. Civ. P. 15(a), an amended complaint on January 11, 1993.

Plaintiff is hereby granted leave to file the amended complaint nun pro tunc. The amended complaint differs from the original complaint in that plaintiff has added paragraphs 23-27 alleging that defendants were acting "under color of state law." Although the amended complaint post dates the motion to dismiss, thereby rendering it moot, the Court will reach the merits as defendants' reply addresses the amended complaint.

Defendants represented Hancock Wood Electric Cooperative (Hancock Wood) in a civil action filed against plaintiff. A judgment was entered in favor of Hancock Wood, and defendants attempted to collect on the judgment. Plaintiff's one-count amended complaint essentially alleges that such efforts were made in violation of his Fourth, Fifth, Sixth, Eight and Fourteenth Amendments rights. Section

1983 provides a remedy for deprivation of rights secured by the Constitution and laws of the United States when that deprivation takes place "under color of any state law." The issue in this case is whether an attorney who proceeds to collect on a judgment is acting under color of state law for purposes of a § 1983 action.

A motion to dismiss under 12(b)(6) tests the legal sufficiency of the complaint. Bing v. General Motors Acceptance Corp., 237 F. Supp. 911 (E.D.S.C. 1965). In ruling upon such a motion, the Court must accept as true all well pleaded allegations of the complaint and may dismiss the action only if it appears, beyond a coubt, that the plaintiff can prove no set of facts which would entitle him to relief. Conley v. Gibson 355 U.S. 41 (1957).

Defendants assert three grounds on

which to dismiss plaintiff's complaint. First, defendants assert that plaintiff's complaint fails to allege that defendants were acting "under color of state law." The amended complaint specifically alleges that defendants were acting under color of state law in obtaining and proceeding to collect on a judgment against plaintiff.

In Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982), the Supreme Court noted that a private party's mere invocation of state legal procedures does not constitute joint participation or conspiracy with state officials for purposes of satisfying the § 1983 requirement of action under color of law. See, Earnest v. Lowentritt, 690 F.2d 1198 (5th Cir. 1982). The Supreme Court went on to hold:

> while private misuse of a state statute does not describe conduct that can be attributed to the State, the procedural

> scheme created by the statute obviously is the product of state action. This is subject to constitutional restraint and properly may be addressed in a § 1983 action. ...

Lugar , 457 U.S. at 941.

Therefore, in order to state a valid cause of action under § 1983, plaintiff must challenge the constitutionality of the underlying state statute. Id. at 941-942. Plaintiff's amended complaint neither challenges the constitutionality of the Ohio Statute on collection, nor can the Court construe it as so. It is clear that plaintiff is not challenging the state created procedure on collection but the alleged misuuse of that procedure by defendants. The Court finds that defendants were not acting under color of state law by attempting to collect on a judgment. Id. at 941.

Since plaintiff has failed to state a cause of action under § 1983, the Court

need not address defendants' remaining two asssertions. Likewise, defendants' motion to strike is moot.

Construing the complaint liberally in favor of the plaintiff, this Court finds that plaintiff has not pled the requirements necessary for a § 1983 action. In particular, the Court finds that defendants were not acting under color of state law by obtaining and proceeding to collect on a judgment against plaintiff.

THEREFORE, for the foregoing reasons, good cause appearing, it is

ORDERED that defendants' motion to dismiss be, and hereby is , GRANTED; and it is

FURTHER ORDERED that defendants' motion to strike be, and hereby is, DENIED as moot.

_____

Sr. U. S. District Judge

NOT FOR PUBLICATION

No. 93-3217

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

WILLIAM P. HICKEY	)	
	)	
Plaintiff-Appellant,	)	ON APPEAL
	)	FROM THE
v.	)	UNITED
	)	STATES
	)	DISTRICT
ROBERT B. HOLLISTER, OXLEY	)	COURT FOR
MALONE, FITZGERALD &	)	THE NORTHERN
HOLLISTER,	)	DISTRICT OF
	)	OHIO
Defendants-Appellees.	)	
	)	

BEFORE: MERRITTT, MILBURN, AND SILER, Circuit Judges.

PER CURIAM. Pro se plaintiff appeals the dismissal of his civil rights action under Federal Rule of Civil Procedure 12(b)(6). On appeal, the issues are (1) whether plaintiff's allegations that defendant attorney misused state law and state procedures in the underlying state litigation are sufficient to state a claim that the attorney was acting under

color of state law for purposes of 42 U.S.C. § 1983, and (2) whether plaintiff's conclusory allegations of a conspiracy between the defendant attorney and various state judges are sufficient to state a claim that the attorney was acting under color of state law for purposes of 42 U.S.C. § 1983. Upon due consideration of the briefs and record filed herein, this panel unanimously agrees that oral argument is not needed. Federal Rule of Appellate Procedure 34(a) and Rule 9(a), Rules of the Sixth Circuit.

I.

In August 1991, Hancock Wood Electric Cooperative filed an action in Bowling Green Municipal Court, Bowling Green, Ohio, against William P. Hickey to recover $2,526.36 that Hickey allegedly owed Hancock Wood on an electrical service account. Robert B. Hollister of

the law firm of Oxley, Malone, Fitzgerald & Hollister ("the Oxley Firm") represented Hancock Wood in that law suit. Hickey made a limited appearance solely to contest the jurisdiction of the Bowling Green Municipal Court. Hickey apparently argued that the Bowling Green Municipal Court, which is located in Wood County, lacked jurisdiction because he lived in Sandusky County. The court ruled against Hickey, finding that jurisdiction was proper. Hickey failed to answer the complaint, and the court granted a default judgment to Hancock Wood. Hickey neither appealed the judgement nor filed a motion seeking relief under Rule 60(b) of the Ohio Rules of Civil Procedure.

When Hickey subsequently failed to appear for a judgment-debtor examination, the Bowling Green Municipal Court issued a capias for his arrest. On January 5,

1992, the Sandusky County Sheriff arrested Hickey and transferred him to the custody of the Wood County Sheriff. Hickey's bond was set at the full amount of the judgment of the judgment debt owed to Hancock Wood. After the Bowling Green Municipal Court refused to lower the bond to 10 percent, a relative of Hickey paid the full bond amount, and Hickey was released on January 7, a992. Hickey appeared in court the following day and submitted to the judgment debtor's examination. One of the questions the judge asked Hickey was whether he had personally paid the bond.

On January 28, 1992, Hickey filed an action in the Sandusky County Court of Common Pleas, alleging, among other things, malicious prosecution, false arrest, and abuse of process against Hancock Wood for pursing and obtaining the judgment in the Bowling Green

Municipal Court. Hancock Wood was again represented by attorney Hollister in this lawsuit. On March 10, 1992, the Sandusky County Court of Common Pleas granted Hancock Wood's motion to transfer the case to Wood County Court of Common Pleas. In Wood County, the case was originally assigned to Judge Charles F. Kurfess, but he eventually had to withdraw, as did the next two judges who were assigned the case. Finally, the Ohio Supreme Court assigned the case to Judge James E. Barber, who dismissed the case in September 1992, finding that it was only a collateral attack on the Bowling Green Municipal Court judgment and, therefore, barred by res judicata, On June 30, 1993, the Court of Appeals of Ohio, Wood County, reversed the Court of Comomon Pleas judgment, holding that the lawsuit was not barred by res judicata or collateral estoppel, and the default

judgment of the Bowling Green Municipal Court was void for lack of subject matter jurisdiction. Hickey v. Hancock Wood Elec. Coop., 1993 WL 241731 (Ohio Ct. App. June 30, 1993), jurisdictional motions overruled, 622 N.E. 2d 654 (1993).1

On October 2, 1992, Hickey, proceeding pro se,2 filed this civil rights action, under 42 U.S.C. §1983, in the federal district court against Hollister,3 the attorney that had represented Hancock Wood in the underlying state court proceedings. Hickey alleged (the "original allegations") that Hollister, in representing Hancock Wood, had "falsely and maliciously, and without any reasonable or probable cause whatsoever, " filed the original action in Bowling Green Municipal Court knowing that that court did not have subject matter or

personal jurisdiction, and caused that court to issue a totally invalid default judgment." J.A. 3-4. Hickey further alleged that Hollister, "falsely and maliciously, and without any reasonable or probable cause whatsoever," induced the Municipal Court to grant Hancock Wood's motion for a debtor examination, caused the issuance of a warrant for Hickey's arrest, conspired with the court to set bond at the full amount of the default judgment, caused Hickey to be arrested, conspired with the court to refuse a deduction of the bond amount, and conspired with the court to hold a debtor's examination. As to Hollister's actions regarding the proceeding in Sandusky Couty Common Please Court, Hickey alleged that Hollister, "maliciously and for purposes of delay, "filed a motion to dismiss and a motion to transfer the case to Wood County, and

"[t]hereafter [Hollister] conspired with members of the Wood County Common Pleas Court to delay as long as possible in order to get the statute of limitations to run out on certain aspects of the case." J.A. 6.

Hickey's complaint asserted that Hollister's actions violated 42 U.S.C. § 1983 because they deprived him of his rights under the Fourth, Fifth, Eighth, and Fourteenth Amendments to the United States Constitution. Hickey sought costs, damages, fees, punitive damages, and any other available relief. Hickey's complaint also asked the district court to "hold the Bowling Green Municipal Court acted outside of its jurisdiction ... and that its default judgment was void ab initio, and unconstitutional." J.A. 7.

Hollister moved to dismiss the complaint for failure to state a claim ,

pursuant to Federal Rule of Civil Procedure 12(b)(6), because Hickey did not claim that Hollister acted under color of state law. Hickey then amended his complaint to add allegations (the "amemded allegations") that Hollister, "under color of state law, and at [his] instigation, conspired with" the judge of the Bowling Green Municipal Court to rule that that court had jurisdiction, "thereby depriving plaintiff of due process of law which requires a defendant to be tried in the county where he resides and/or where the cause of action arose (a rule of law stemming from the English Common Law)." J.A. 31-32. Hickey's amended complaint also contained other similar allegations of actions under color of state law and conspiracy regarding the issuance of a summons, his arrest, and the action in Common Pleas Court.

On February 2, 1992, the district court granted Hollister's motion to dismiss for failure to state a claim upon which relief can be granted. Relying on Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982), the district court held that in order to state a valid cause of action against a private party under § 1983, a plaintiff must challenge the constitutionality of the underlying state statute, not just the misuse of that statute by the private party. The district court found that Hickey's amended complaint could not be construed as challenging the state created procedure on collection, and accordingly held that the complaint failed to state a claim because Hollister was not acting under color of state law. This timely appeal followed.

II.

Whether the district court correctly

dismissed a case pursuant to Federal Rule of Civil Procedure 12(b)(6) is a question of law subject to de novo review. E.g., Mertik v. Blalock, 983 F.2d 1353, 1356(6th Cir. 1993). In determining if plaintiff's complaint fails to state a claim upon which relief can be granted, we must accept as true all factual allegations of the complaint, but we need not accept as true legal conclusions or unwarranted factual inferences. Morgan v. Church's Fried Chicken, 829 F.2d 10, 12 (6th Cir. 1987). "A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73(1984). "Although this standard for Rule 12(b)(6) dismissals is quite liberal, more than bare assertions of legal conclusions is ordinarily required to satisfy federal

notice pleading requirements." Scheid v. Fanny Farmer Candy Shops, Inc., 859 F.2d 434,436(6th Cir. 1988).

A cause of action is provided by 42 U.S.C. § 1983 against "[e]very person who, under color of any statute ... of any State ... subjects, or causes to be subjected, any citizen ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." "The purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." Wyatt v. Cole, 112 S.CT. 1827, 1830 (1992). To state a claim under §1983, a plaintiff must allege (1) that he was deprived of a right secured by the Constitution or laws of the United States, and (2) that the deprivation was caused by a person acting

under color of state law. Flagg Bros., Inc. v. Brooks,436 U.S. 149, 155-56 (1978). Absent either element, a claim will not be stated. The present case concerns the second element namely whether Hickey's complaint satisfactorily pleads that Hollister, a private party, was acting under color of state law.

Hickey's original allegations stated that ;Hollister "falsely and maliciously and without any reasonable or probable cause" undertook various actions in the state courts that deprived Hickey of his Consitutional rights. These allegations fail to state a claim under § 1983 because they do not show that Hollister was acting under color of state law.

In Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982), the Court considered whether as private party could be deemed to have acted under color of state law by invoking a state procedure providing for

prejudgment attachment of a debtor's property. The Court determined that a private person, such as Hollister, who invokes state created procedures acts "under color of state law" within the meaning of § 1983 only if his actions are "fairly attributable to the State." Id. at 937. This requirement is met if (1) the claimed constitutional deprivation has resulted from "the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible," and (2) "the party charged with the deprivation [is] a person who may fairly be said to be a state actor" because he has "acted together with or has obtained significant aid from state officials" or engaged in conduct "otherwise chargeable to the State." Id.; see also Wyatt v. Cole, 112 S. Ct. at 1830 (summarizing Lugar).

To satisfy the first condition for finding that a private party's actions are "fairly attributable to the state," a plaintiff cannot merely challenge a private party's misuse of a state statute, but rather must challenge the constitutionality of the state statute that createed a right, the exercise of which allegedly caused plaintiff's constitutional deprivation. See Lugar, 457 U.S. at 940-41. If the plaintiff alleges only that a private party misused an otherwise valid state statute or procedure and that this misuse caused the constitutional deprivation, the private party has not acted under color of state law because private action, rather than a state created right, has caused the alleged injury. "While private misuse of a state statute does not describe conduct that can be attributed to the State, the procedural scheme created by the statute

obviously is the product of state action." Id. at 941. Thus, in Lugar the Court held that the plaintiff's allegation that the defendant private party "invoked the statute without the grounds to do so did not state a cause of action under § 1983, because the action "could in no way be attributed to a state rule or a state decision". Id. at 940. However, the Court held that a separate count of the complaint that challenged the state statute as procedurally defective under the Fourteenth Amendment did satisfy the first requirement of the "fairly attributable " test. Id. at 941.

In this case, Hickey is not challenging the validity of the various state statutes and procedural rules used by Hollister in pursuing and defending the underlying state litigation for Hancock Wood. Rather, Hickey is challenging Hollister's alleged misuse of

these state statutes and procedures. For example, Hickey alleges that Hollister "falsely and malicuously and without reasonable or probable cause whatsoever, filed the collection action in Bowling Green Municipal Court while knowing that court did not have jurisdiction and, as a result, caused an invalid default judgment to be entered, from which Hollister then availed his client of the debtor examination procedures of the municipal court. These allegations, as do the other similar allegations concerning Hollister's actions in defending the state court proceeding brought by Hickey, merely allege that Hollister abused the state statutes and procedures. At no time has Hickey alleged that these statutes or procedures violate the Constitution or federal law. Because Hickey does not challenge the validity of the state statutes or

procedures allegedly misused by Hollister, his original allegations fail to show that Hollister was acting under color of state law.

Hickey's original and amended allegations also state that Hollister conspired with various judges in thoe underlying state litigation. Private persons who conspire with state officials to deprive a plaintiff of civil rights are acting under color of state law for purposes of § 1983. Dennis v. Sparks, 449 U.S. 24, 29-29 (1980). However, "merely resorting to the courts and being on the winning side of a lawsuit does not make a party a co-conspirator or a joint actor with the judge." Id. at 28. Therefore, in order to state a conspiracy claim under § 1983, a plaintiff must plead the conspiracy with some degeree of specificity. "[V]ague and conclusory allegations unsupported by material facts

will not be sufficient to state such a claim under § 1983." Gutierrez v. Lynch, 826 F.2d 1534, 1538 (6th Cir. 1987).

Hickey's allegations that Hollister conspired with the various state court judges are conclusory and unsupported by any factual allegations or inferences. For example, Hickey's complaint alleges that Hollister, "under color of state law, and at [his] instigation, conspired with the judge of the Municipal Court" to rule that jurisdiction was proper, to issue a summons by mail, and to arrest Hickey. Hickey does not specify any facts upon which his allegations of conspiracies are based. Hickey does not identify when the conspiracies were formed or what the inducement was for the judge to have "conspired" with Hollister to take these allegedly improper actions in the underlying litigation involving a $2,526.36 debt on an electric account.

In sum, Hickey's conclusory allegations of conspiracy are insufficient to state a claim under [1983's color of state law requirement.

III.

For the reasons stated, the order granting defendant's motion to dismiss is AFFIRMED. Rule 9(b)(3), Rules of the Sixth Circuit.